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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/649,691
Filing Date: August 28, 2003
Appellant(s): MANIACI, DAVID

John D. Gugliotta
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed October 26, 2006 appealing from the Office action mailed 2/24/06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

A substantially correct copy of appealed claims appears on page 15 of the Appendix to the appellant's brief. The minor errors are as follows: claim 2, line 1 "said cubholding" should be "said cupholding".

(8) Evidence Relied Upon

Des. 351,316	MANN	10-1994
5,803,305	PERLIS et al	09-1998
3,955,672	BRUNDAGE	05-1976

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

A. Claims 1-2 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mann (US Des. 351316) in view of Caner (US Des. 242106) and Perlis et al. (US 5803305). With respect to claim 1, Mann discloses the following:

- A plate support surface having a peripheral edge (Fig. 1 below)
- A stiffened (to the degree that Applicant's rim is stiffened as shown in Fig. 3), circular outer flange rim circumscribing the entire plate support surface at an elevation above the plate support surfaces (Fig. 1 below)
- An upwardly curving peripheral rim connecting between said plate support surface and said outer flange (Fig. 1 below)
- A pair of partition elements connected at a centerpoint of the plate support surface and radiating out to the outer flange, each partition element having a flat upper apex connecting to the circular outer flange at the flanges elevation (Fig. 1 below)
- The partition elements forming an acute angle at the centerpoint at a base of the partition sidewall such that a first large compartment is formed at the acute angle between the partition elements and the outer flange (Fig. 1 below)
- A cup retaining orifice formed within the plate support surface and positioned

such as to intersect at the outer circumference of the plate the cup support rim (Fig. 1 below)

• A third partition element connecting the cup support rim with the flat upper apex of the other partition elements, the third partition element having a flat upper apex (Fig. 1 below)

• Cup rim intersecting the peripheral edge, such that the peripheral rim and cup support rim are superimposed about a small arc (Fig. 1 below)

However, Mann fails to teach the partition elements transitioning smoothly to the elevation of the plate support surface by a curving partition sidewall having a similar curvature with the upwardly curving peripheral rim, and the cup support rim being stiffened. Nonetheless, Caner teaches a compartmented plate having partition elements transitioning smoothly to the elevation of the plate support surface by a curving partition sidewall having a similar curvature with the upwardly curving peripheral rim (Fig. 1). Having smooth transitions to the elevation of the plate support surface provides radii, thereby significantly reducing stress concentrations. Furthermore, Perlis et al. teaches a cup holding plate having a stiffened cup support rim, as shown in Fig. 2 below, wherein the substantially flat, outwardly extending cup holder rim provides flexural strength. Therefore, it would have been obvious to one of ordinary skill in the art at the time of invention to add smooth transitions from the partition elements to the plate support surface of Mann as taught by Caner, and furthermore a stiffened cup support rim as taught by Perils et al. so as to significantly reduce stress concentrations and to provide additional flexural strength, respectively.

With respect to claim 2, Perlis et al. teaches constructing the container of plastic (Col. 5, Lines 10-16). Furthermore, it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416.

B. Claims 3 and 4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brundage (US 3955672) in view of Caner (US Des. 242106) and Perlis et al. (US 5803305)

With respect to claim 3, Brundage discloses the following:

- A plate support surface having a peripheral edge (Fig. 3 below)
- A stiffened, to the degree that Applicant's rim is stiffened as shown in Fig. 3, circular outer flange rim circumscribing the entire plate support surface at an elevation above the plate support surfaces (Fig. 3 below)
- An upwardly curving peripheral rim connecting between said plate support surface and said outer flange (Fig. 3 below)
- A cup retaining orifice formed within the plate support surface and positioned such as to intersect at the outer circumference of the plate the cup support rim (Fig. 3 below)
- A single partition element bisecting the plate support surface through a centerpoint of the plate support surface between the outer flange, the partition having a flat upper apex, as shown in Fig. 3 below

However, Brundage fails to teach the partition element transitioning smoothly to the elevation of the plate support surface by a curving partition sidewall having a similar curvature with the upwardly curving peripheral rim, and the cup support rim being stiffened. Nonetheless, Caner teaches a compartmented plate having partition elements transitioning smoothly to the elevation of the plate support surface by a curving partition sidewall having a similar curvature with the upwardly curving peripheral rim (Fig. 1). Having smooth transitions to the elevation of the plate support surface provides radii, thereby significantly reducing stress concentrations. Furthermore, Perlis et al. teaches a cup holding plate having a stiffened cup support rim, as shown in Fig. 2 below, wherein the substantially flat, outwardly extending cup holder rim provides flexural strength. Therefore, it would have been obvious to one of ordinary skill in the art at the time of invention to add smooth transitions from the partition elements to the plate support surface of Brundage as taught by Caner, and furthermore a stiffened cup support rim as taught by Perlis et al. so as to significantly reduce stress concentrations and to provide additional flexural strength, respectively.

With respect to claim 4, Perlis et al. teaches constructing the container of plastic (Col. 5, Lines 10-16). Furthermore, it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416.

C. Claims 5 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brundage in view of Perlis et al.

With respect to claim 5, Brundage discloses the claimed invention except for having a stiffened cup support rim. However, Perlis et al. teaches a cup holding plate having a stiffened cup support rim, as shown in Fig. 2 below, wherein the substantially flat, outwardly extending cup holder rim provides flexural strength. Therefore, it would have been obvious to one of ordinary skill in the art at the time of invention to stiffen the cup support rim of Brundage as taught by Perlis et al. so as to provide additional flexural strength, respectively.

With respect to claim 6, Perlis et al. teaches constructing the container of plastic (Col. 5, Lines 10-16). Furthermore, it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. /n re Leshin, 125 USPQ 416. Therefore it would have been obvious to one of ordinary skill in the art at the time of invention to make the cupholding plate of Brundage out of plastic as this is a known material used to make plates.

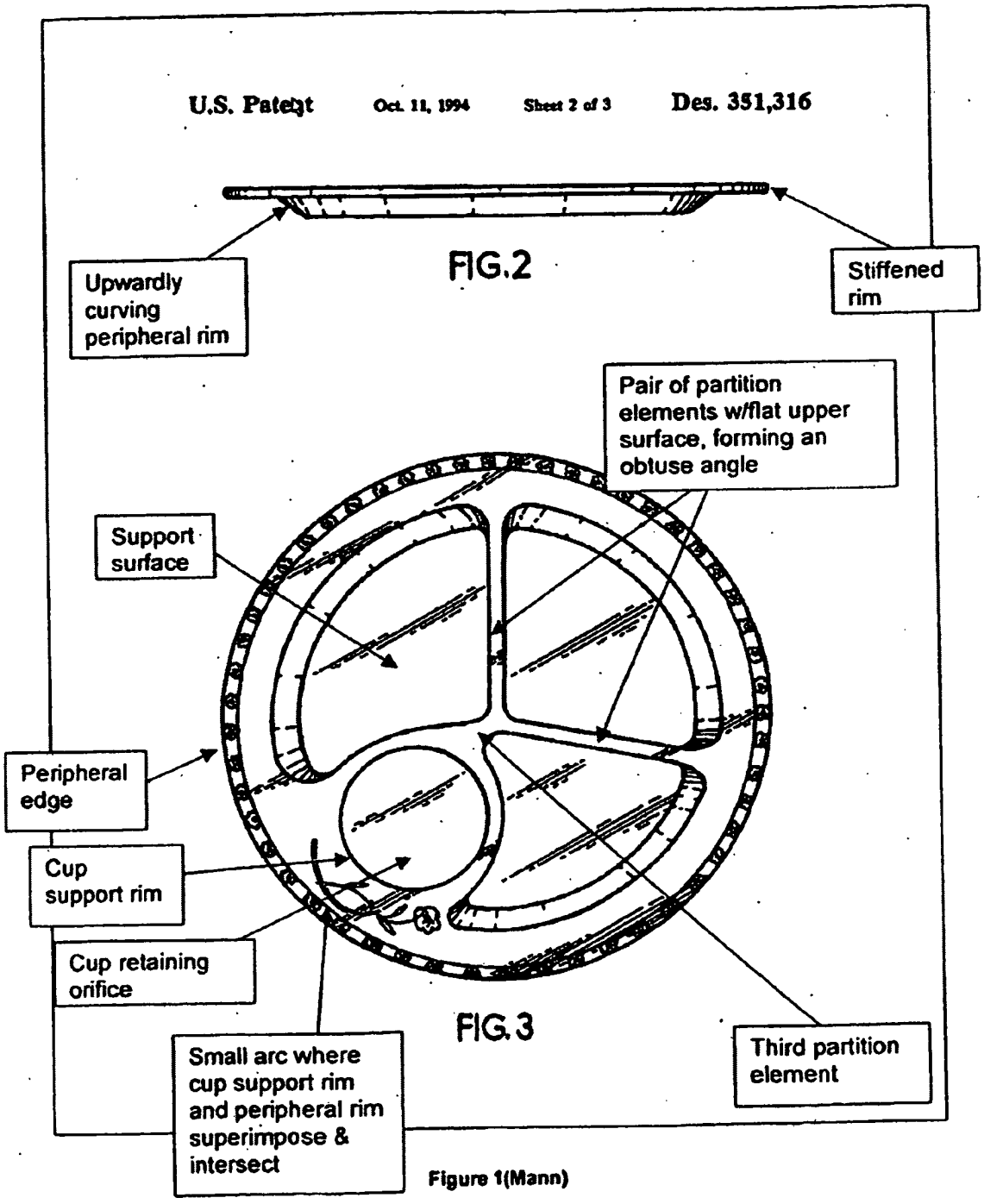

Figure 1(Mann)

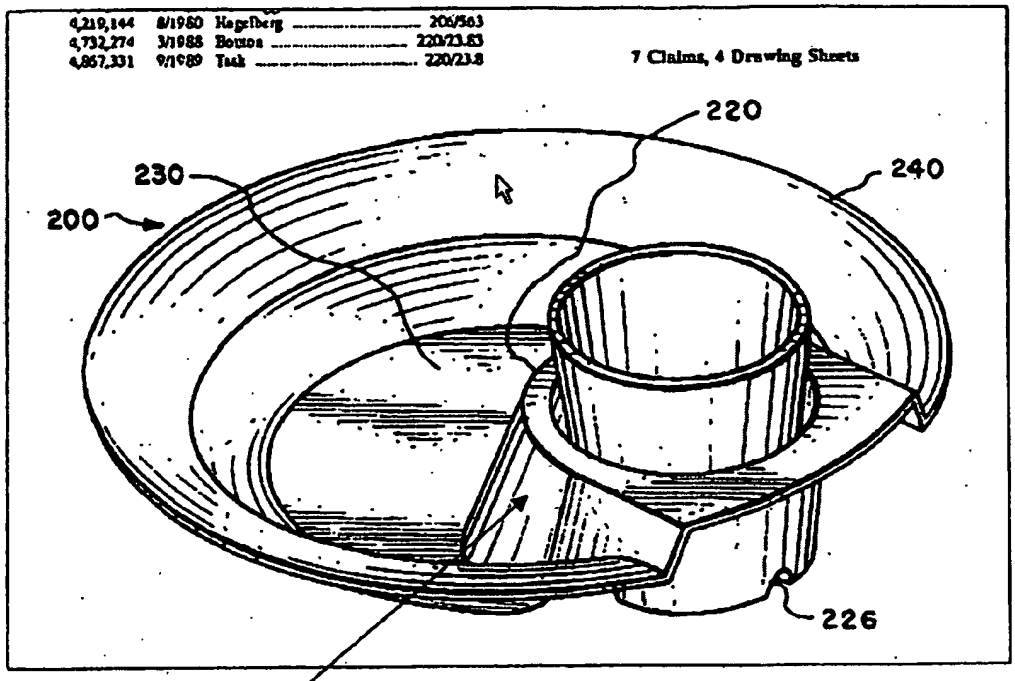

Figure 2 (Perlis)

Stiffened cup support rim (upwardly extending portion)

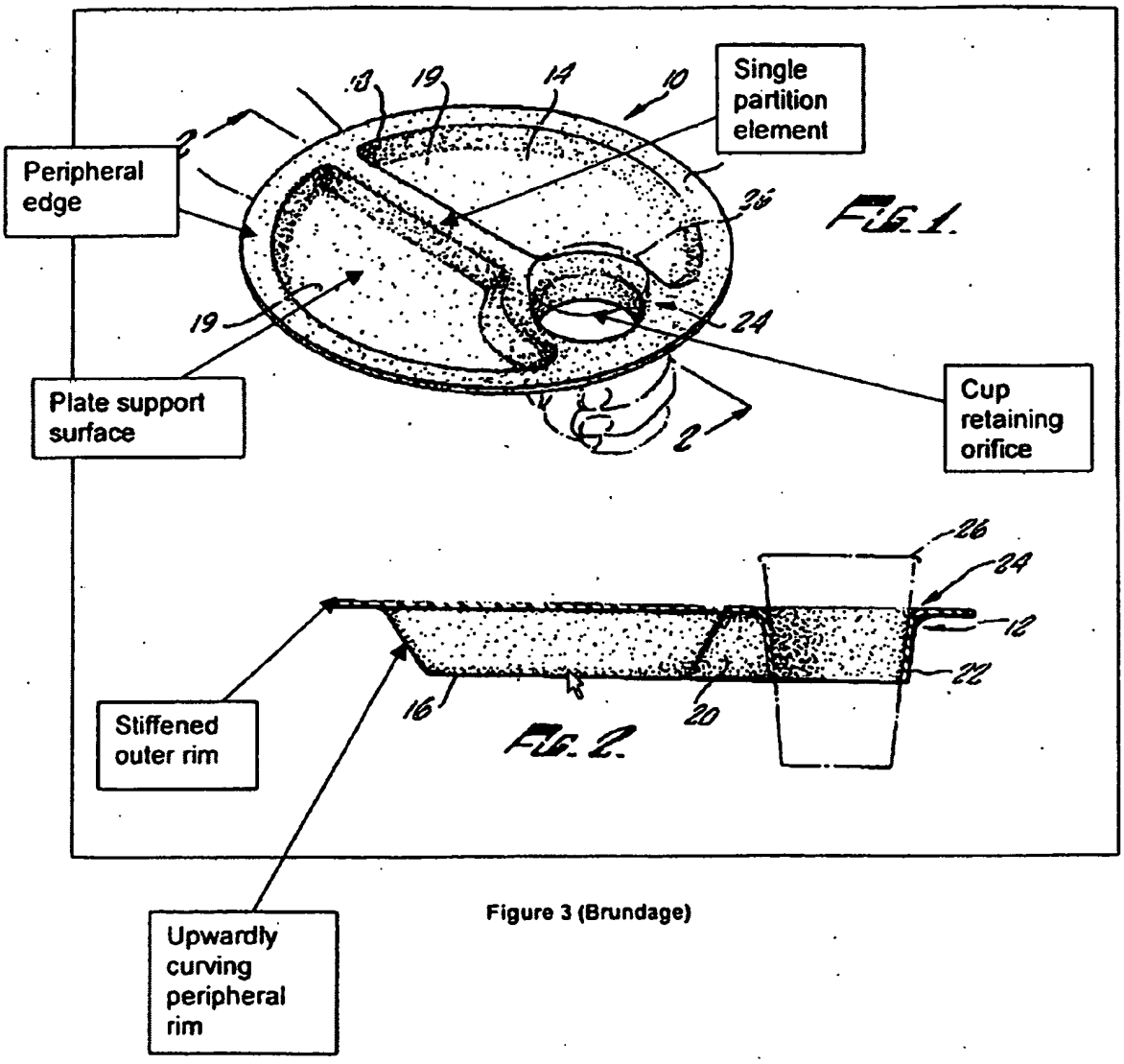

Figure 3 (Brundage)

(10) Response to Argument

A. Claims 1-2 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mann (US Des. 351316) in view of Caner (US Des. 242106) and Perils et al. (US 5803305).

With respect to claim 1, Appellant argues that Mann does not disclose the specific connection at the center point, specifically the angular requirements. Appellant argues that Mann, in Fig. 4 shows that the lower left portion does not form an angle at a center point and terminates past the center point and toward the upper right. The Examiner has not referenced Fig. 4 of Mann, nonetheless, Mann teaches the pair of partition elements forming an obtuse angle at a center point, as shown in both Fig. 3 and Fig. 4 in the upper portion of the figures. This meets the limitations of the claims. Examiner has expressly stated that Mann does not indeed teach the claimed curvature of the partition element- plate support transition being similar to that of the upwardly curving peripheral rim. However, Examiner used Caner (US D242106) to teach said limitation, as explained above.

Appellant argues that none of the cited references teaches the cup holding area being open, wherein Appellant has not claimed said limitation. Appellant argues that this limitation is made by the use of the term "orifice" in the element "a cup retaining orifice." This phrase does not define the location of the orifice and the opening in the top of the cupholding section of Mann that allows entry of the cup would constitute a cup-retaining orifice.

Appellant also argues the use of Brundage for claim 1. However, Examiner

hasn't applied Brundage to claim 1. Brundage was applied to claims 3 and 5.

With respect to claims 2 & 4 & 6, Appellant argues that two references are made to two different "types" of plastic, namely a lower grade (disposable) and higher grade (reusable), wherein this may not encompass all plastics. Appellant argues it is unobvious to combine two inventions that are made of two different plastics with clearly different purposes. However, Appellant claims plastic, which encompasses all forms of polymers. Moreover, it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed, i.e. disposable or reusable, does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. Ex parte Masham, 2 USPQ2d 1647 (1987).

B. Claims 3 and 4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brundage (US 3955672) in view of Caner (US Des. 242106) and Perlis et al. (US 5803305).

With respect to claim 3, Appellant notes that the Examiner has stated Brundage does not teach a smooth transition between partition and plate support surface, and Appellant further argues "this seems to go against the assertion that Brundage teaches an upwardly curving peripheral rim connection between the plate support surface and outer flange." This argument is unclear. The upwardly curving peripheral rim is located at the outer portion of the container as shown above in Fig. 3, and the smooth transition that Brundage fails to teach is between the partition and the plate support surface, again shown above in Fig. 3. It is unclear how the fact that Brundage does not teach a smooth transition between the partition and plate support goes against the fact that Brundage

discloses an upwardly curving peripheral rim since they are not structurally dependent on one

another, and are located at different regions of the plate.

With respect to claims 2 & 4 & 6, Appellant argues that two references are made to two different "types" of plastic, namely a lower grade (disposable) and higher grade (reusable), wherein this may not encompass all plastics. However, Appellant claims plastic, which encompasses all forms of polymers. Moreover, it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed, i.e. disposable or reusable, does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. Ex parte Masham, 2 USPQ2d 1647 (1987)

C. Claims 5 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brundage in view of Perlis et al.

With respect to claim 5, Appellant notes that the Examiner has stated Brundage does not teach a smooth transition between partition and plate support surface, and Appellant further argues "this seems to go against the assertion that Brundage teaches an upwardly curving peripheral rim connection between the plate support surface and outer flange." This argument is unclear. The upwardly curving peripheral rim is located at the outer portion of the container as shown above in Fig. 3, and the smooth transition that Brundage fails to teach is between the partition and the plate support surface, again shown above in Fig. 3. It is unclear how the fact that Brundage does not teach a smooth transition between the partition and plate support goes against the fact that Brundage

discloses an upwardly curving peripheral rim since they are not structurally dependent on one

another, and are located at different regions of the plate.

With respect to claims 2 & 4 & 6, Appellant argues that two references are made to two different "types" of plastic, namely a lower grade (disposable) and higher grade (reusable), wherein this may not encompass all plastics. However, Appellant claims plastic, which encompasses all forms of polymers. Moreover, it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed, i.e. disposable or reusable, does not differentiate the claimed apparatus from prior art apparatus satisfying the claimed structural limitations. Ex parte Masham, 2 USPQ2d 1647 (1987).

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See In re McLaughlin, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention

where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See In re Fine, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988)and In re Jones, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Mann, Brundage, Caner, and Perlis all disclose analogous inventions, namely plates having partitions and/or cup holding orifices, thus rendering said references combinable under knowledge available to one of ordinary skill in the art (see rejection above for details).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Harry A. Grosso

Conferees:

Anthony Stashick

Nathan Newhouse